



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Northwest Regional Educational Laboratory

File: B-222591.3

Date: January 21, 1987

DIGEST

1. Protest that agency failed to hold meaningful discussions with offeror, is without merit where agency sent protester detailed questions that apprised the protester of the areas of its proposal with which the agency was concerned, and the protester was given an opportunity to revise its proposal in response to these questions.
2. Protest that agency did not rescore technical proposals - following discussions and receipt of best and final offers (BAFO's) is denied where agency's review panel discussed BAFO's and adequately reported the results of its reevaluation to the selection official.
3. Protest that award was not made to the lowest cost proposal is denied where awardee's proposal was found substantially technically superior, and the selection official determined that the technical superiority warranted the additional cost.
4. Allegation that offeror's personnel met with procuring agency personnel does not, by itself, provide any basis for conclusion that agency engaged in technical transfusion.

DECISION

The Northwest Regional Educational Laboratory (NWREL) protests the award of a contract to Interface Consultants, Inc. (ICI), under request for proposals (RFP) No. 86-026, issued by the United States Department of Education for the design, development and operation of regional multifunctional resource centers for bilingual education programs. While the RFP covered 16 geographic regions, this protest concerns only the award for service area nine, which includes the states of Washington, Oregon, Idaho, Wyoming, and Montana. NWREL protests that Education failed to

notify it of deficiencies in its proposal, did not adhere to the RFP evaluation criteria in evaluating proposals, engaged in technical transfusion, and awarded to other than the low cost offeror. We deny the protest.

NWREL, ICI and the University of Washington submitted proposals for service area nine. The RFP provided for award to the offeror whose proposal represents the combination of technical merit and cost most favorable to the government without specifying the relative importance of each. A five-member technical evaluation panel reviewed and rated the three proposals. The panel gave NWREL's proposal a technical score of 69 out of a possible score of 100 and recommended that the proposal be found technically unacceptable, but capable of being made acceptable. ICI's proposal received a technical score of 90.4, and was found technically acceptable. The contracting officer reviewed the panel findings and the proposals, including the prices. He essentially adopted the panel's findings with respect to ICI and NWREL. The University of Washington proposal had received an average technical score of 59, and three of the panelists had recommended that it be found technically unacceptable, but capable of being made acceptable, while two panelists found it to be unacceptable. The contracting officer noted that the contracting officer's technical representative (COTR) had determined that, despite its deficiencies, this proposal contained an outstanding conceptual approach. Based on his review of the panel findings and the COTR's recommendation, the contracting officer included all three offerors in the competitive range.

The contract specialist and the COTR developed a list of questions for each offeror based on the concerns noted during the proposal evaluation, and all three offerors were provided with these questions by telephone on August 8, 1986, with written confirmation of the questions provided shortly thereafter. ICI's written questions were hand delivered to its executive director who was in Washington, D.C., at the time, on other business. ICI was asked 27 questions and NWREL was asked 38 questions, specifically directed at each proposal. NWREL's questions included the following:

"(2) The proposed training and technical assistance format is most appropriate for larger districts with significant LEP populations and reasonably sophisticated bilingual programs. The format is rather formal and involved. How will the offeror

provide pre-service assistance and how will the offeror respond to the day-to-day, hands-on needs of the classroom teachers?

"(3) The language population statistics and needs evaluation focuses almost entirely on current Title VII projects. What are the overall language demographics of the service area, and what are the critical needs of populations that are not currently being served?

"(4) The proposal makes a very strong case for NWREL's theoretical, policy and research background but is weak in application experience. This weakness is also present in the proposed staff skills. Can adjustments in staffing be made to upgrade 'practitioner experience' and expand the potential for effective technical service to teachers?

"(5) The proposed project director does not have strong management experience. How will NWREL support the director and how will this Center be administratively integrated into the Lab's management structure?"

Oral discussions were held with all three offerors on August 20 and 21 concerning their responses to the questions raised by Education and the three offerors were requested to submit best and final offers (BAFO's), both as to cost and technical, by August 29.

All three offerors submitted BAFO's which incorporated changes and clarifications in response to Education's questions. Education reconvened its original panel, with four out of five of the panel members present, along with the COTR. The panel reviewed the original proposals, their original comments, and the BAFO's, to determine whether the offerors had corrected the areas of concern. The panel found that ICI's responses enhanced its previously acceptable proposal. It determined that NWREL had allayed concerns regarding its ability to reach small remote areas, and that its proposal was marginally acceptable, even though staffing weaknesses were still present. Washington's proposal was found to have been substantially improved, although weaknesses still existed in its management plan.

The panel concluded that ICI's proposal constituted the best presentation for area nine and it was ranked first. Washington's proposal was now ranked acceptable and second, and NWREL's proposal was determined to be marginally acceptable and ranked last. The panel and the COTR recommended award to ICI.

The contract specialist updated his cost analysis based on the BAFO's, and reevaluated the cost proposals. The RFP calls for a level of effort contract with Education purchasing services based on a specified number of technical personnel. Therefore, the cost evaluation included a comparison of the offerors' proposed cost per full-time equivalent staff (FTE). Under the RFP, a range of six to eight FTE's was permitted. The cost analysis showed that while NWREL had the lowest evaluated 3-year cost of \$1,620,648, compared to ICI's cost of \$1,834,741, ICI had the lowest evaluated cost per FTE of \$229,343.63, compared to NWREL's cost of \$251,263.26 because NWREL's proposal utilized only 6.45 FTE's while ICI's proposal used eight FTE's.

Based on the recommendation from the panel and the COTR, and the cost analysis, the contracting officer made award to ICI on September 22, 1986, on the basis that it offered a technically superior proposal, while representing a better cost value.

NWREL's first assertion, that it was not advised of any deficiencies in its initial proposal, as required by the Federal Acquisition Regulation (FAR), 48 C.F.R § 15.610(c)(2) (1985), is primarily based on the fact that it viewed the tone of the agency telephone calls of August 8 and 20 as "complimentary," and that it was included in the competitive range with no specific mention of "deficiencies." In addition, NWREL contends that no "bargaining" was conducted during the negotiation process. With respect to this latter allegation, the record indicates that the contracting officer provided all of the offerors with a specific list of agency concerns with their initial proposals, and requested BAFO's from all three offerors. This, in itself, is sufficient to constitute discussions or negotiations. Security Systems, B-217203, Aug. 26, 1985, 85-2 C.P.D. ¶ 229. While the protester cites FAR, 48 C.F.R § 15.102, as containing a requirement that there be "bargaining" under a negotiated procurement, there is no such requirement; rather, the section simply states that "negotiation . . . permits bargaining, and usually affords offerors an opportunity to revise their offers before award of a contract."

With respect to whether NWREL was adequately notified of deficiencies in its proposal, this requirement, which is essentially one that meaningful written or oral discussions must be conducted with all offerors in the competitive range, does not mean that offerors are entitled to all-encompassing discussions. Rather, agencies are only required to lead offerors into areas of their proposals needing amplification. Technical Services Corp., B-216408.2, June 5, 1985, 85-1 C.P.D. ¶ 640. The actual content and extent of discussions are matters of judgment primarily for determination by the agency involved, and our Office will review the agency judgments only to determine if they are reasonable. Tide-water Health Evaluation Center, Inc., B-223635.3, Nov. 17, 1986, 86-2 C.P.D. ¶ 563. Further, once having been apprised of problem areas in its proposal, the burden is on the offeror to furnish satisfactory responses after discussions are conducted. Professional Review of Florida, Inc. et al., B-215303.3 et al., Apr. 5, 1985, 85-1 C.P.D. ¶ 394. We find that Education's discussions with NWREL were meaningful.

Education presented NWREL with 38 specific questions, many of which pointed to perceived deficiencies in its proposal, some of which have been quoted above. In response to these questions, NWREL's BAFO resulted in an improved technical proposal that was considered acceptable. NWREL's conclusion -- that its proposal was always considered by Education to be technically equal to the other proposals, and that it contained no deficiencies--based on the tenor of phone conversations with Education--is not supported by the record. Rather, the record discloses that NWREL was advised in detail of the deficiencies and weaknesses in its proposal, and was given an adequate opportunity to address the questions raised and revise its proposal--which NWREL did.

With respect to NWREL's allegation that Education failed to adhere to the RFP evaluation criteria, this is based solely on the fact that the BAFO's were not specifically rescored. However, there generally is no requirement that an agency formally rescore BAFO's. VSE Corp., B-224397, Oct. 3, 1986, 86-2 C.P.D. ¶ 392. While a point scoring system may be useful as a guide to decision making, numerical scores do not transform the technical evaluation, which is inherently subjective, into an objective process. The purpose of initial point scores is not to determine the ultimate outcome of the competition, but rather to establish a competitive range of offers to be evaluated further upon submission of

BAFO's. CRC Systems, Inc., B-207847, May 2, 1983, 83-1 C.P.D. ¶ 462. Moreover, in the final source selection process, the selection official is not bound by the scoring of the technical evaluators, provided his ultimate decision has a reasonable basis and is consistent with the evaluation criteria. VSE Corp., B-224397, supra.

Here, Education reports that the COTR reviewed the BAFO's with four of the five original panel members. After reviewing the record, the panelists and the COTR determined that ICI's technical proposal was substantially superior to that of NWREL, and recommended award to ICI on the basis of technical superiority. The COTR also noted that ICI's cost per FTE was actually lower than NWREL's. The contracting officer concurred that ICI's proposal was technically substantially superior to the other proposals, and made a determination that ICI's proposal's technical superiority warranted the additional cost. Under these circumstances, we do not see how a formal rescoring after BAFO's could have altered that judgment. In any event, whether the revised proposals were rescored is not a matter of concern so long as the results of the reevaluation were adequately reported to the selection official, as here. Hager, Sharp & Abramson, Inc., B-201368, May 8, 1981, 81-1 C.P.D. ¶ 365.

NWREL's objection that it should have been awarded the contract on the basis that it provided the lowest cost proposal is predicated on its inference that it provided a proposal which was found technically equal to ICI's. However, as indicated above, such was not the case, and the agency was entitled to determine that ICI's technically superior proposal was worth its additional cost. VSE Corp., B-224397, supra.

Finally, NWREL's contention that the agency engaged in technical transfusion is based solely on the fact that ICI personnel met with Education personnel during the course of the negotiations. Education states that the meetings concerned other unrelated matters, and that the only germane occurrence was the physical handing of written questions to ICI. FAR, 48 C.F.R. § 15.610(d)(2), proscribes the contracting officer from engaging in technical transfusion, defined as government disclosure of technical information pertaining to a proposal that results in improvement of a competitor's proposal. In order to establish that technical transfusion has occurred, the record must establish that the contracting

agency either directly or indirectly disclosed one offeror's technical approach to another offeror. TEK, J.V. et al., B-221320, et al., Apr. 15, 1986, 86-1 C.P.D. ¶ 365. NWREL has provided no evidence of any such disclosure, nor is there any evidence in the record.

The protest is denied.

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General Counsel